

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO**

In re:)	
)	
EUGENE ROSS WILLIS and)	Case No. 12-23106 HRT
DEBORAH LOUISE WILLIS,)	Chapter 7
)	
Debtors.)	
<hr/>		
DENNIS W. KING, TRUSTEE,)	
)	Adversary Case No. 13-01503 HRT
Plaintiff,)	
)	
v.)	
)	
ARK WOODWORKS, INC., a Colorado)	
Corporation, and NASSER HAJI-SARVESTANI,)	
an individual,)	
)	
Defendants.)	

**OPINION RE JURISDICTION OF BANKRUPTCY
COURT TO MAKE FINAL RULING ON COMPLAINT**

THIS MATTER came before the Court on its order for briefs regarding its jurisdiction to make a final ruling on the complaint in the above-captioned case.

On September 9, 2013, Dennis W. King, the chapter 7 trustee, (the “Trustee”) filed the above-captioned adversary proceeding (the “Complaint”) against ARK Woodworks, Inc. and Nasser Haji-Sarvestani (jointly, the “Defendants”) pursuant to section 542(b) of title 11 of the United States Code (the “Bankruptcy Code”) seeking turnover of amounts allegedly owed to Eugene and Deborah Willis (jointly, the “Debtors”).

The basis for the relief requested in the Complaint is a number of invoices (the “Invoices”) provided by the Debtors to the Trustee at their section 341(a) Meeting. The Invoices were billed to ARK Woodworks, Inc., of which Mr. Haji-Sarvestani is the principal, for services provided to the Defendants in the cumulative amount of \$18,356.49. The Invoices were issued from “Olde Time Cabinets & Furniture LLC” (“Olde Time LLC”). The Trustee alleges in the Complaint that Mr. Willis used Olde Time LLC as a trade name for his business, not a separate entity.

The Trustee alleges that the amount owed to the Debtors by the Defendants is property of the estate pursuant to section 541 of the Bankruptcy Code and, therefore, should be turned over to the estate pursuant to section 542.

The Defendants assert that the amount due per the Invoices is not property of the estate; that amount is due to Olde Time LLC which is not merely a trade name but a separate legal entity. According to the Defendants, Olde Time LLC is a registered Colorado limited liability company which renders it a distinct entity from the Debtors. A copy of Olde Time LLC's records from the Colorado Secretary of State's office, though unauthenticated, indicates that this is a colorable defense.

Resolution of this dispute will require the application of Colorado state law regarding the allocation of ownership of assets between a limited liability company and its principal. Based on the United States Supreme Court's ruling in *Stern v. Marshall*, 540 U.S. ___, 131 S. Ct. 2594 (2011), the Court requested that the parties submit briefs regarding its jurisdiction to hear this matter pursuant to a minute order dated December 4, 2013 (Docket #9).

The Court has reviewed the briefs and is ready to rule. Claims for turnover of estate property pursuant to section 542(b) are within the *in rem* jurisdiction of the bankruptcy court. Judge Gerber of the Southern District of New York articulated the post-*Stern* standard in *In re Pali Holdings, Inc.* as follows:

Stern “has nothing to do with the Court’s *in rem* jurisdiction to administer property of the estate.” Where, as here, there are no serious defenses to the estate’s section 542 turnover rights, a bankruptcy judge can exercise the bankruptcy court’s *in rem* jurisdiction to issue a final judgment for the turnover of the estate’s property, or to monetize it. Just as bankruptcy courts under the 1898 Act could exercise summary jurisdiction over turnover claims when the defenses to such claims were not “real and substantial,” they can do the equivalent of that now. Whatever constitutional limits might exist with respect to bringing new property into the estate (such as in actions at common law on contracts), those limits cannot be said to exist with respect to recovering property – or on property – that is already there.

488 B.R. 841, 852 (Bankr. S.D.N.Y. 2013)(citations omitted). The court notes that this standard has been applied consistently throughout the country. *See Pali Holdings* at 851 n.37.

However, the court in *Pali Holdings* goes on to distinguish the situation where there is a significant dispute regarding the ownership of the property at issue. If that is the case, the question of whether such property belongs to the estate pursuant to section 541 must first be resolved. In such instances, the dispute is a non-core action for which this Court cannot issue a final ruling explained as follows:

The claims are not “orders to turn over property of the estate,” § 157(b)(2)(E), because an “action for turnover of property is core when its purpose is the collection rather than the creation, recognition or

liquidation of a matured debt. Numerous courts have therefore held that an action is non-core when property which is the subject of a significant dispute between the parties is sought to be recovered through a turnover action.” These actions are subject to significant dispute, resolution of which will determine whether the funds redeemed are in fact property of the [debtors’] estates. They are not core claims under section 157(b)(2)(E).

In re Fairfield Sentry Ltd. Litig., 458 B.R. 665, 683 (S.D.N.Y. 2011)(citations omitted).

The distinction between a pure turnover action and a significantly disputed one is subtle but essential to determining whether the Court has jurisdiction. This distinction actually pre-dates *Stern* as explained by the court in *Pali Holdings*:

Of course, the turnover power can be improperly invoked, especially when it is used as a Trojan Horse for bringing garden variety contract claims; when the property in question is not already property of the estate; or when the turnover statute is used to recover assets with disputed title when the estate’s claim of ownership is legitimately debatable. It is well established that the turnover power may not be used for such purposes.

Judge Bernstein recognized in [*Savage v. Mandl (In re Teligent)*, 325 B.R. 134, 38 (Bankr.S.D.N.Y.2005)] that exercising jurisdiction over an improperly brought turnover action could eviscerate the Supreme Court’s holding in *Marathon* [*Northern Pipeline Construction Co., v. Marathon Pipeline Co.*, 459 U.S. 813 (1982)] by allowing the bankruptcy court to exercise judicial power reserved for Article III courts. Thus, that the turnover power be properly invoked is integral to the bankruptcy court’s ability to constitutionally exercise its in rem jurisdiction in entering a final judgment.

Id. at 851 n.39. Essentially, this issue was settled more than thirty years ago by the Supreme Court in *Marathon* where the court held that bankruptcy courts do not have blanket jurisdiction over all civil proceedings either arising under Title 11 or related thereto. More recent decisions like *Stern* and *Executive Benefits Ins. Agency v. Arkison (In re Bellingham Insurance Agency, Inc.)*, __ S.Ct. __, 2014 WL 2560461 (2014), have served to clarify the scope of bankruptcy courts’ jurisdiction but have not altered the fundamental precept of *Marathon*.

In this case, the Complaint is an improperly invoked turnover action. It seeks the “turnover” of an asset when that asset may not be property of the bankruptcy estate. The fact that the Invoices were issued by Olde Time LLC, a putatively registered Colorado limited liability company, tips the focal point of the Complaint from recovery of estate assets to determination of whether the Invoices are estate assets. In other words, the Complaint is not a section 542 turnover action but a section 541 dispute over whether an asset is estate property. Since this is outside the scope of the Court’s *in rem* jurisdiction, the Court finds in accordance with *Pali Holdings* that this dispute is a non-core matter.

As a non-core matter, the Court's jurisdiction to hear the Complaint is governed by § 157(c) and *Stern*. Recently, the United States Supreme Court clarified the bankruptcy courts' jurisdiction to hear non-core matters in the post-*Stern* world. In *Bellingham*, the Supreme Court found that if a matter is determined to be a non-core issue pursuant to § 157(b), the bankruptcy court must "look to § 157(c)(1) to determine whether the claim may be adjudicated as a non-core claim – specifically, whether it is 'not a core proceeding' but is 'otherwise related to a case under title 11.'" 2014 WL at *7. If the issue qualifies under the terms of § 157(c)(1) as related to the underlying bankruptcy case, then the "bankruptcy court should hear the matter and submit findings of fact and conclusions of law to the district court for *de novo* review and entry of judgment." *Id.*

However, that is not the end of the analysis. Even though the Court has authority to preside over a trial on the Complaint, it must next determine whether abstention is appropriate. Section 1334(c)(1) of Title 28 of the United States Code provides the Court with the discretion to abstain from hearing non-core matters. Where a bankruptcy court is not required to abstain, it may use its discretion to do so where the interest of the bankruptcy court hearing the matter is outweighed by other factors. Those other factors are as follows:

(1) the effect or lack thereof on the efficient administration of the estate if a Court recommends abstention, (2) the extent to which state law issues predominate over bankruptcy issues, (3) the difficulty or unsettled nature of the applicable law, (4) the presence of a related proceeding commenced in state court or other nonbankruptcy court, (5) the jurisdictional basis, if any, other than 28 U.S.C. § 1334, (6) the degree of relatedness or remoteness of the proceeding to the main bankruptcy case, (7) the substance rather than form of an asserted "core" proceeding, (8) the feasibility of severing state law claims from core bankruptcy matters to allow judgments to be entered in state court with enforcement left to the bankruptcy court, (9) the burden of [the bankruptcy court's] docket, (10) the likelihood that the commencement of the proceeding in bankruptcy court involves forum shopping by one of the parties, (11) the existence of a right to a jury trial, and (12) the presence in the proceeding of nondebtor parties.

In re Tucson Estates, Inc., 912 F.2d 1162, 1167 (9th Cir.1990) (citing *In re Republic Reader's Serv., Inc.*, 81 B.R. 422, 429 (Bankr.S.D.Tex.1987)).

In this case, the discretionary abstention factors favor abstention. Application of these factors to the Complaint is as follows:

1. It would be far more efficient for the state court to hear an accounts receivable dispute because this is the type of dispute routinely adjudicated before it.
2. Resolution of the Complaint will be determined entirely in accordance with Colorado state law.

3. There is no indication on the record that the disputed Invoices involve any areas of unsettled Colorado law. Moreover, if they do, those are best decided by the state court.
4. Factor #4 does not apply.
5. There is no basis for federal jurisdiction over this state law collection action other than 28 U.S.C. § 1334.
6. As discussed above, the dispute at issue in the Complaint relates to the liquidation of an asset which is a “non-core” proceeding.
7. The complaint was presented to this Court as a section 542 turnover action when in substance it is an accounts receivable dispute governed by state law.
8. Factor #8, severance of a core claim, does not apply. Both liquidation of the estate’s claim to the Invoices and enforcement of a judgment through routine post-judgment collection procedures should be accomplished in a single state court forum.
9. Factor #9 does not apply.
10. It appears that the Trustee brought this dispute in the bankruptcy court to take advantage of the turnover provisions of the Bankruptcy Code; however, as discussed above, turnover is not the appropriate cause of action. Moreover, the disputed issue involves a non-debtor entity, Olde Time LLC, making the state court the appropriate forum.
11. The Court need not determine whether the right to trial by jury attaches to this matter because the other factors the Court has considered persuade the Court that abstention is appropriate.
12. The Defendants are non-debtor parties who have not consented to this Court’s jurisdiction.

Finally, because this matter is an entirely state law dispute, taking jurisdiction away from the state court would be against the interest of comity between the federal courts and the state courts.

Based on the foregoing, the Court hereby orders as follows:

- 1) The Complaint raises a non-core dispute pursuant to 28 U.S.C. § 157.
- 2) Discretionary abstention is warranted according to factors described above.
- 3) Therefore, the Trustee’s Complaint is **DISMISSED** without prejudice to the Trustee’s right to refile this action in an appropriate state court.

Dated this 25th day of June, 2014.

BY THE COURT:

A handwritten signature in black ink, reading "Howard R. Tallman". The signature is written in a cursive, flowing style. The first name "Howard" is written in a larger, more prominent script, and "R. Tallman" follows in a similar but slightly smaller script.

Howard R. Tallman, Chief Judge
United States Bankruptcy Court